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Held at Headquarters, New York,
on Thursday, 4 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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98-80745 (E)

The meeting was called to order at 10.10 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.4)

1. The CHAIRMAN invited the Commission to begin consideration of draft chapter III of the legislative guide, entitled "Selection of the concessionai (A/CN.9/444/Add.4).

Paragraphs 1-5

2. Mr. WALLACE (United States of America) praised the organization and structure of chapter III. As the purpose of the legislative guide was to hel host countries stimulate the flow of capital in order to develop their infrastructures, the Commission's aim was presumably to eliminate obstacles which stood in their way. One of those obstacles could be removed by providi an appropriate legislative framework. Since another obstacle was the excessi time devoted to contracting, the selection process would serve the interests Governments by enabling them to conclude agreements more speedily, a point th could be brought out more forcefully at the beginning of the draft.

3. It was not entirely clear in the document whether competitive selection intended to apply to all privately financed infrastructure projects, as he wo prefer, and whether it should be regarded as the norm. In addition, the term used for the would-be concessionaire should be carefully chosen. The text referred alternately to the "candidate" and the "proponent", and the term "tenderer" also appeared in paragraph 2 of the notes. However, the UNCITRAL Model Law on Procurement of Goods, Construction and Services drew a clear distinction between tendering, as the preferred method of selecting supplier goods and construction, and the services method. Thus, the selection of a project company was not a form of tendering, but a method of choosing the provider of a global service, and the term "tendering" should therefore be avoided.

4. Mr. RESTREPO-URIBE (Colombia), referring to paragraph 3 (a), said it wa important to clarify that the purchase of shares was one method of taking control of a public utility company established as a share company.

5. Mr. LALLIOT (France) agreed with the representative of the United State America that the principle of competition should govern the selection proced provided that the terms used in reference to competition were clearly define In French law, and in European Union law, "competition" or "concurrence" app specifically to public contracts but was excluded for several of the practic envisaged in the draft guide for build-operate-transfer (BOT) contracts, suc pre-selection negotiations and the alteration of specifications, a practice contemplated in recommendation 10. Because the notion of competition as use the text embraced such practices, the French term "concurrence" should not b used as an equivalent; he suggested as an alternative "transparency", which already used in the draft guide, for example in recommendation 22. That was concept familiar to French and European law and to the case law of the Europ Court of Justice, as a requirement of the contracting process for concession for public works.

6. Price was not the only criterion to be considered in awarding contracts; there were others, such as technical capacity to perform the work in question. The reference in paragraph 2 to the UNCITRAL Model Law might therefore be misleading, unless due emphasis was placed on the mutatis mutandis provision.

7. Mr. CHOUKRI (Observer for Morocco) said that paragraph 2 should include a reference to the fact that many States had not yet applied the UNCITRAL Model Law, and had legislation that was at variance with it. Moroccan law, for example, stipulated that a private investor must give guarantees of performance. UNCITRAL had in fact prepared a convention on guarantees, and there should be some mention of them in the draft guide.

8. In paragraph 3 it should be made clear that States, unlike individuals, could make bonds or shares in public utility enterprises available for purchase only after legislation had been enacted for the purpose.

9. Mr. LAMBERTZ (Observer for Sweden) drew attention to paragraph 1, which stated that the guide expressed "a clear preference for the use of competitive selection procedures". He did not object to that statement, but he did feel that the legislative character of the draft guide was being watered down and that the draft was being turned into a compendium of general advice. The Commission, he recalled, had initially debated whether there was any purpose in taking up the subject of private financing for public infrastructure projects when the United Nations Industrial Development Organization (UNIDO) had just finished work on the same subject. It had been pointed out that the work done by UNIDO was not of a legislative character. Yet the Commission now seemed to be engaged in preparing a general, rather than a legislative, text, and he wondered whether that was the right approach. The Commission should avoid recommending the procurement procedures set out in the draft guide as if they were the only possible ones and allow for the fact that direct negotiations would often be the chosen method.

10. Mr. OLIVENCIA-RUIZ (Spain) objected to the reference in paragraph 1 to "project consortia". The parties bidding for the contract did not necessarily form a consortium, at least not until the contract was concluded. In paragraph 3 (a) of the Spanish version, the term "obligaciones" was not the correct rendering of "shares".

11. Mr. RESTREPO-URIBE (Colombia) agreed that the term "shares" should not be translated as "obligaciones".

12. Mr. LIU Yang (China) said that neither method of choosing the concessionaire - competitive selection and direct negotiations - should take precedence over the other. In some countries, owing to the cost of tendering, there were few prospective concessionaires, and direct negotiations were a better method.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the comments of Commission members made it clear that the terms "competitive method" and "competition" had a more precise connotation in some legal systems than they did in the text of the draft guide. In the guide, "competition" was used to

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designate a method of comparing different proposals. Although the draft guide had been inspired by the UNCITRAL Model Law on procurement, the procedures outlined in the guide were not the same as those in the Model Law. He recalled also that some countries, especially in Latin America, made no specific provision for privately financed infrastructure projects, but simply applied their general laws on procurement.

14. While the draft guide provided for a particular type of procurement, it would be useful to learn from Commission members what other kinds of emphasis were needed. As for the respective priority accorded to competitive selection and direct negotiations, the draft guide did mention that the practice of direct negotiations was followed in some countries and referred to the circumstances in which they might be warranted. In preparing chapter III, a task undertaken with the assistance of experts and in consultation with other organizations such as UNIDO and the World Bank, it had been thought necessary to offer a particular solution for a particular kind of procurement problem, rather than merely describing the various possibilities. There had been no intention of excluding alternative methods.

15. Mr. LALLIOT (France) said that the term "compétition" would be the best variant in French for the English term "competition". "Tendering", which had been rendered "appel d'offres" in the French version could be replaced by the term "appel de candidatures", and "the awarding authority" might become "l'autorité concédante" or "l'autorité attributrice".

16. As for the issue of direct negotiations versus competitive selection, it was important not to confuse two different extremes. The public contracting procedure gave the contracting authority less room for manoeuvre than did the principle of intuitis personae, which applied to delegated contracts and which, it was believed, tended to encourage arbitrary rather than discretionary decisions. An intermediate solution was needed in order to meet the twin objectives of informed choice and transparency. Such a solution might be to specify the need for a preliminary stage in which the contract had to be publicly advertised and bids invited, while not excluding the possibility of direct negotiations with the candidates at a later stage.

17. Mr. WALLACE (United States of America) said that the concerns expressed by the observer for Sweden could be accommodated by some redrafting along the lines of the last sentence in paragraph 17, emphasizing the legislative character of the proposed model for competitive selection procedures. In many countries, the key problem with major infrastructure projects was precisely the lack of transparency and non-competitive nature of the procedures used, which exposed civil servants to criticism. However, the guide was in no way intended to impose any kind of straitjacket on legislators, and there was in fact plenty of scope for direct negotiation. As for the Model Law, it reflected a definite philosophy already endorsed by the General Assembly. The Commission was simply embracing that philosophy by seeking to devise a legally framed method applicable to BOT projects.

18. Mr. CHOUKRI (Observer for Morocco) said that while he understood the terminological difficulties raised by the representative of France, the translation into Arabic of terms based on the UNCITRAL Model Law was

satisfactory. In his experience, a concessionaire selected through an orderly and honest competitive bidding process was likely to be the one which had offered the best price and the most guarantees.

19. Mr. LAMBERTZ (Observer for Sweden) said that the more neutral wording suggested by the representative of the United States met the concerns of his delegation. He would, however, prefer a stricter formulation for the recommendations and expansion of the portion of the text on direct negotiations.

20. Mr. LIU Yang (China) said that, when appropriate, China used the selection method, but when the number of participants was high, it adopted an open and transparent selection method involving competitive bidding. Thus far it had carried out several successful BOT projects, but in most of those cases, only one company had expressed interest or submitted a proposal. It was not that the Government did not provide an enabling environment, but that the competitive market simply did not yet exist. In paragraph 3 (a) of the notes, a preference for competitive selection could be expressed without excluding direct negotiations with project consortia or companies.

21. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Secretariat had contemplated a situation where only one bidder might be interested. Without prejudice to later decisions, the commission might wish at the least to include a reference to the later discussion of that proposal in that paragraph.

22. Mr. OLIVENCIA-RUIZ (Spain) said that in discussing legislative options the preference for competitive selection methods should be maintained, but with an explicit mention that direct negotiations had not been ruled out. Transparency as a fundamental principle was the most important aspect of the process and applied in all cases.

Paragraphs 6-14

23. Mr. WALLACE (United States of America) drew attention to paragraph 10 and said that in order to increase confidence in the selection process, and in the interests of transparency, a competitive method must be used. Direct negotiations could raise questions about integrity. Turning to paragraphs 12 to 14, he said that allowing a bidder to challenge a selection process promoted greater transparency through the need for record-keeping. The requirement to protect proprietary information should be highlighted in that section as well.

24. Ms. GUREYEVA (Russian Federation) said that using a more neutral term than "consortia", such as "project organizations", might widen the circle of potential candidates. She found the reference to policy objectives in the first sentence of paragraph 12 too strong. While the competitive bidding process must be open and transparent, confidentiality must be ensured.

25. Mr. GUISLAIN (Observer for the World Bank) suggested that the first sentence of paragraph 8 could be replaced by the following: "Foreign participation is healthy in general and is in many countries required by law, either pursuant to national legislation or to international treaties or agreements a country may have entered into." It should be borne in mind that

the main reason for having the private sector provide infrastructure services was to obtain better services at better prices. If the best operators were foreign, then national companies should not be protected from competition. The entire economy would thus become more competitive, and consumers would be better served in the end. Furthermore, infrastructure contracts should include clauses requiring discretion.

26. Mr. LALLIOT (France) said it was important to recall that the basic objective for awarding contracts was to ensure continuity of public services and equality of users. It seemed appropriate to include a reference to the need for confidentiality and the right to challenge or recourse in paragraph 10. Some of the terms used in the French version did not correspond with the English version, in particular "responsabilité redditionnel" for "accountability" (para. 13) and "minime" for "minimal" (para. 9), and more appropriate translations were needed.

27. Ms. GIOIA (Italy) said, that some of the many different terms used to define the parties included "States", "Governments", "host Government" and "awarding authority". Perhaps "host Government" should apply only to transnational transactions. Likewise, in paragraph 8 the private party was referred to both as a consortium and a company. Those terms needed clarification.

28. Mr. ESTRELLA FARIA (International Trade Law Branch) said that in most of the projects covered by the guide, a large group of companies submitted bids jointly; that was the meaning given to the term "consortium". He preferred to limit the use of the term "company" to a particular entity which had been established to carry out a project. It was difficult to find a single term in French which conveyed the meanings given to "State", but the term "host Government" did emphasize the transnational element of a project.

29. Replying to the observer for the World Bank, he explained that paragraph 8 had been drawn from previous discussions during the preparation of the Model Law on procurement. He saw that paragraph as a mere statement of fact that some countries found foreign participation advantageous.

The meeting was suspended at 11.30 a.m. and resumed at noon.

30. Mr. GILL (India) said that paragraph 11 expressed the concern that selection proceedings were often time-consuming and expensive; in some countries, the longer they lasted, the more gifts were exchanged. The paragraph should therefore recommend that a time-limit should be placed on selection proceedings. Furthermore, paragraph 6 should stipulate that the established methods and procedures of host countries should take precedence over new methodologies applied to individual cases.

31. Ms. NIKANJAM (Islamic Republic of Iran) agreed with the representative of Italy that the use of the word "State" should be reconsidered. Although in United Nations usage it meant the Government, people and country as a whole, in domestic systems it often referred only to the executive power.

32. With regard to paragraphs 10 and 11, the Russian and French delegations had raised important points. It might prove useful to suggest that countries should set out provisions describing the nature of the companies they preferred; infrastructure companies had a right to know a country's preferences before joining in a competitive process.

33. Mr. RESTREPO-URIBE (Colombia) said that an important element of transparency was the effort to eliminate corruption. The Commission should perhaps consider recommending that contracting entities and contractors should enter into integrity agreements stipulating that they would refrain from any activities that would prejudice the fairness of the selection process. That proposal might be incorporated either into section 2, which dealt with the matter of integrity and confidence, or into section 3, which addressed the matter of the transparency of laws and procedures.

34. Mr. CHOUKRI (Observer for Morocco) said that the effort to eliminate corruption involved the interests of both the contracting entities and the host Government. He could not say how many countries had incorporated the UNCITRAL Model Law on International Commercial Arbitration into their domestic legislation; most States did, however, have anti-corruption laws. Integrity, confidence and transparency could not be achieved without a system of judicial oversight. The legislative guide should recommend prompt prosecution of all violations of the integrity of the selection process.

35. Mr. TELL (France) said he welcomed the concern raised by the representative of Colombia. He was not sure, however, what sort of agreement had been meant. The matter of corruption had been dealt with elsewhere in the guide, and a number of international agreements had been cited. Any further reference to corruption should be carefully coordinated with earlier references. The section dealing with the transparency of laws and procedures might be the appropriate place to suggest that States should address the matter of corruption in legislation governing the selection of concessionaires.

36. Mr. RESTREPO-URIBE (Colombia) said that his delegation was well aware that the problem of corruption affected not only the selection of contractors, but public administration in the broadest sense. He had been referring not to international treaties, but to an increasingly common practice among contracting entities and contractors, namely, the conclusion of agreements in which both parties undertook to refrain from actions which would influence the selection process.

37. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the proposal put forward by Colombia was not a new idea: in fact, the UNCITRAL Model Law on Procurement of Goods, Construction and Services prohibited inducements from suppliers and contractors, and established that such inducements should be considered grounds for disqualification.

38. Mr. OLIVENCIA-RUIZ (Spain) said that the sections dealing with the questions of integrity and transparency were complementary: the promotion of integrity and confidence depended on the clarity of laws and procedures. The English term "accountability" had indeed been surprisingly translated into French; the Spanish translation, "rendición de cuentas" was better. He would

prefer, however, the classical Spanish term "cuenta y razón", which subsumed the concepts of both accountability and responsibility.

39. Paragraph 10 stipulated that a selection system should contain provisions to discourage unintentional and intentional abuses of the selection process. The representative of the Secretariat had aptly noted that the UNCITRAL Model Law on procurement took up that matter; in his view, elements of the Model Law should be incorporated into the chapter under discussion. He agreed with the observer for Morocco that the Commission should not only envisage measures to prevent corruption, but should also recommend the establishment of punitive sanctions against parties that engaged in corruption. UNCITRAL was a judicial body, and there was nothing more illicit than corruption; all UNCITRAL texts should emphasize the basic principle that acts of corruption should be punished. Furthermore, the United Nations and other international bodies were seeking to cultivate international awareness of the need to combat corruption, and UNCITRAL should participate in that process.

40. Mr. WALLACE (United States of America) said that the aim was to reduce corruption by developing an open, tightly designed selection system that would provide for the most objective selection methods possible. Although some degree of discretion was inevitable in dealing with such complex projects, it should be channelled and disciplined so as to minimize the potential for corruption. Ideas such as the "islands of integrity" proposed by the non-governmental organization Transparency International or pledges to refrain from engaging in corrupt practices were not reliable solutions. While he agreed with the representative of Spain that enforcement was important, most countries already had laws against bribery and other forms of corruption; the Commission's task was to develop a selection system that would effectively achieve its purposes while minimizing opportunities for corruption.

41. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that he welcomed the text's emphasis on the issue of transparency, which did not always receive the attention it deserved. Transparency was important for guaranteeing not only equality among applicants, but also the integrity of the host Government and its accountability to the public at large. He supported the proposal by the representative of France that the reasonable exercise of discretionary power should be monitored. He also shared the views expressed by previous speakers on the need to protect the confidentiality of business information.

42. Mr. MARADIAGA (Honduras) said that he welcomed the attention given to the problem of corruption, which was a destructive phenomenon that had plagued the vast majority of Latin American countries. In the second sentence of paragraph 10, the words "reduce or discourage" were not strong enough; the paragraph should refer instead to the eradication of abuses of the selection process, which was the primary aim of transparency. He agreed with the representative of France that restrictions should be placed on discretionary powers.

43. Ms. LALLIOT (France) said, with respect to the question of confidentiality, that it was important not only to guarantee transparency, but also to take the interests of companies into account. Problems could arise if the records of selection proceedings referred to in paragraph 13 were detailed to the point of

including information on the specific qualifications or shortcomings of individual proponents. Instead, the awarding authority should agree to provide proponents whose offers were rejected with a written explanation of the decision, on the basis of which such proponents could exercise their right to seek review. Otherwise, transparency measures could defeat their own purpose. For example, some qualified candidates might refuse to submit proposals for fear that their techniques or procedures would be disclosed to their competitors.

Paragraphs 15-25

44. Mr. GUISLAIN (Observer for the World Bank) said that the second sentence of paragraph 17 did not accurately describe World Bank procedures and should be changed to reflect what was correctly stated in the footnote pertaining to that sentence. He did not understand what was meant by the indication, in paragraph 22, that the private sector would bear the risks that might result from the inadequacy of the technical solutions used. Governments might wish to stipulate, as a key requirement for many projects, that they would accept only tested technical approaches that had a track record of successful application in other cases.

45. In paragraph 24, it was important to distinguish between qualification and evaluation criteria. For example, the fourth sentence of that paragraph might refer to either qualification or evaluation criteria, depending on the selection method used. Lastly, he was concerned about the reference to negotiation in the final sentence of paragraph 25. Negotiations conducted after a contract had been awarded could result in a situation in which the selected project consortium's ranking would have been different had the initial bid been made on the amended terms. Accordingly, the sentence should specify that such negotiations were to be held only on non-substantive issues.

46. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraph 17 would be corrected. With respect to the last sentence of paragraph 22, he explained that, under more traditional procurement procedures, candidates were invited to submit bids that conformed to specifications drawn up by the awarding authority, which also chose the technology to be used. However, under a system that invited more innovation and initiative from the private sector, the responsibility and liability for the proposals necessarily shifted to the private sector, irrespective of any requirement that the technology used must have been tested previously.

47. With respect to paragraph 25, the extent to which negotiations were appropriate after a project had been awarded was discussed later in the notes. The overall philosophy was that negotiations should not be used as a means of subverting the reasons and criteria pursuant to which the project had been awarded to a given consortium.

48. Mr. LALLIOT (France) said that paragraphs 15 to 25 were well balanced. The word "exécuteur", which appeared in the first sentence of paragraph 21, had more than one meaning; a more precise term should be substituted. In addition, the expression "maître d'ouvrage" would be more properly rendered as "maître d'oeuvre". Lastly, the terms "intrants" and "extrants", which were translations of the terms "inputs" and "outputs", were unclear and should be changed.

49. Mr. WALLACE (United States of America) said that legislative recommendation 2 was related to the technical issue of prequalification policy. However, paragraph 20 of the notes, which related to that recommendation, was not sufficiently clear in that regard. Although the normal practice was to send out a prequalification questionnaire and to invite all qualified candidates to submit proposals, recommendation 2 implied that procuring entities that did not wish to deal with a large number of proposals might decide to negotiate with only three or four candidates in the short term. However, that practice would violate one of the World Bank's procurement rules. Moreover, it must be borne in mind that, as the selection process progressed, the procuring entity might change its view of the desired parameters of the project in question and, accordingly, its view of whether or not a given bidder was qualified. In the last sentence of paragraph 20, the word "therefore" was inappropriate, as the sentence did not, in fact, sum up the points made by the preceding sentences.

50. Mr. LAMBERTZ (Observer for Sweden) said that he questioned the advisability of including recommendations 1 and 2 in the legislative guide. Instead, recommendation 1 should become an introductory paragraph; the word "normally" should be inserted before "advisable" and the second sentence should be replaced with the words "The guide therefore contains legislative recommendations which relate primarily to such methods".

51. Recommendation 2 was not really a legislative recommendation, but rather a piece of advice on a less important issue, which could be included either in another text or in the notes on the legislative recommendations. Moreover, since article 7 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services indicated only that "the procuring entity may engage in prequalification proceedings", the legislative guide should not recommend the use of such proceedings.

The meeting rose at 1.05 p.m.